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No. 697

IN THE

Supreme Court of the United States

OCTOBER TERM 1965

CARPENTER BODY WORKS,

Petitioner,

v.

TOMMY D. McCULLY, JR., ET AL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

To the Honorable Supreme Court of the United States:

The District Court of Brazoria County, Texas entered an *order* overruling Petitioner's plea to the jurisdiction of that court. Petitioner sought to appeal from such order to the Texas Court of Civil Appeals at Houston. That court dismissed the appeal, holding that it did not have jurisdiction because the order appealed from was purely interlocutory and that Texas had no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction. *Carpenter Body Works, Inc.* v. *Tommy D. McCulley, Jr., et al,* 389 S.W. 2d 331, error ref'd. (Appendix "A")

Respondents disagree with the statements contained in the Petition for Writ of Certiorari, to the effect that the Court of Civil Appeals *affirmed* a *judgment* of the district court and *held* that Petitioner was amenable to service of process by virtue of Article 2031b, Revised Civil Statutes of Texas.

The opinion of the court below expressly states that *if Petitioner suffers adverse judgment in a trial on the merits, its complaints on appeal may encompass one complaining of the trial court's action in overruling its plea to the jurisdiction.* (Appendix "A", page 2a)

RESPONDENTS' GROUNDS IN OPPOSITION

The Petition for Writ of Certiorari should be refused because it discloses that this case does not involve (1) a final judgment (2) of a state court of last resort (3) which decides a federal question as required by the provisions of 28 U.S.C., Sec. 1257.

I.

THE ORDER OF THE STATE TRIAL COURT OVERRULING PETITIONER'S PLEA TO THE JURISDICTION WAS INTERLOCUTORY AND NOT A FINAL, APPEALABLE JUDGMENT

Article 2249, Revised Civil Statutes of Texas, provides that an appeal or writ of error may be taken to the Court of Civil Appeals from every *final* judgment of the district court in civil cases (Appendix "B"). Furthermore, Texas statutes provide for appeals from certain enumerated interlocutory orders (e.g. an appeal from an order overruling or sustaining a plea of privilege in venue cases is authorized by Article 2008, Revised Civil Statutes of Texas), but neither Article 2031b, Revised Civil Statutes of Texas, under which jurisdiction was asserted over Petitioner in the trial court, nor Rule 120a, Texas Rules of Civil Procedure, authorizing a special appearance by non-resident defendants, nor any other state statute or rule provides for a *separate* appeal from an order overruling a plea to the jurisdiction.

Although an order of a state trial court sustaining a motion to dismiss for want of jurisdiction is final and, therefore, appealable, an order overruling a motion to dismiss for want of jurisdiction is interlocutory, not appealable, and this Court has long held it lacks jurisdiction to review such an order by certiorari.[1]

Petitioner has not been deprived of the right of appeal. To the contrary, such right is expressly provided by Article 2249, Revised Civil Statutes of Texas. (Appendix "B") It is wholly within the prerogative of the state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise.[2]

In holding that the order appealed from was purely interlocutory and that no rule or statute authorized an appeal

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[1] "Had this motion been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie within Section 128. United States v. Carey, 9 Cir., 143 F. 2d 445; United States v. Marin, 9 Cir., 136 F. 2d 388. But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. Cf. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185. See also Dieckmann v. United States, 7 Cir., 88 F. 2d 902. Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner." *Catlin* v. *United States,* 324 U.S. 229, 65 S. Ct. 631 at page 635, 89 L. Ed. 911 (1945).

[2] "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John* v. *Paullin,* 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381 (1913).

therefrom, the Texas Court of Civil Appeals correctly stated the state law applicable at that stage of this litigation.[3]

Just as the state appellate court was without jurisdiction to review the district court's order overruling Petitioner's plea to the jurisdiction (absent a state statute or rule so providing), this Court is also without jurisdiction to review.[4]

II.

THE DECISION OF THE TEXAS COURT OF CIVIL APPEALS WAS NOT BASED ON A FEDERAL QUESTION

Petitioner's attempted appeal from an order of the district court overruling Petitioner's plea to the jurisdiction was *dismissed* by the Court of Civil Appeals based on that court's decision that:

> "We are of the view that the order appealed from is purely interlocutory and that there is no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction." (Appendix "A")

The Texas Court of Civil Appeals, as previously noted, did not pass on the merits of Petitioner's plea to the juris-

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[3] "The judgment of the District Court overruling the plea to the jurisdiction was interlocutory and not appealable." *Fishbein* v. *Thornton*, 247 S.W. 2d 404 (no writ hist.).

[4] "As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. . . . Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision." *John* v. *Paullin*, 231 U.S. 583, 34 S. Ct. 178, 58 L. Ed. 381 (1913).

diction of the trial court. That question has not been determined by a final judgment of a state court of last resort, and is still subject to review should there be an appeal from a final judgment of the trial court on the merits of this case.

The opinion of the court below is clearly based on the fact that the applicable *procedural* law of Texas does not provide for a *separate* appeal from an interlocutory order of a district court overruling a plea to the jurisdiction. Thus the decision of the Texas court sought to be reviewed here was not based on a federal question within the meaning of 28 U.S.C., Sec. 1257.

There was involved below nothing but the application of Texas procedural law. Absent the decision of a federal question as a necessary basis of the opinion below, this Court has consistently held that it lacks jurisdiction to review the ruling of the state court.[5]

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[5] "It is settled law that, to give this court jurisdiction of a writ of error to a state court, it must appear, affirmatively, not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment, as rendered, could not have been given without deciding it. Murdock v. Memphis, 20 Wall. 590; Cook Co. v. Calument & C. Canal & Dock Co., 138 U.S. 635. 11 Sup. Ct. Rep. 435. It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment." *Eustis* v. *Bolles,* 150 U.S. 361, 14 S. Ct. 131 at page 132, 37 L. Ed. 1111 (1893); *Wood* v. *Cheeseborough,* 228 U.S. 667, 33 S. Ct. 706, 57 L. Ed. 1018 (1913).

III.

PETITIONER'S AUTHORITIES ON JURISDICTION DISTINGUISHED

Petitioner relies on *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U.S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523. This Court expressly stated that *Mercantile* involved (1) a substantial claim (2) *appealable under state law* (3) involving a *federal* banking statute, rather than a state statute (4) from a *final* decision of the Texas Supreme Court (5) that was a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issue comprising Plaintiff's cause of action. Furthermore, this Court's jurisdiction was there noted under 28 U.S.C., Section 1257(2) rather than under 1257(3), relied upon by Petitioner here.

None of these elements is involved in the case at bar.

Petitioner also cites, and relies upon, *Local No. 438, Construction and General Laborers Union, A.F.L.-C.I.O.* v. *Curry,* 371 U.S. 542, 83 S. Ct. 531. There, too, a *federal* question had been *finally* decided by a state *court of last resort.*

Again, none of those jurisdictional prerequisites exists in the present case. There has been no determination, final or otherwise, of Petitioner's plea to the jurisdiction by any Texas appellate court.

Respondents submit that the Petition for Writ of Certiorari should be refused.

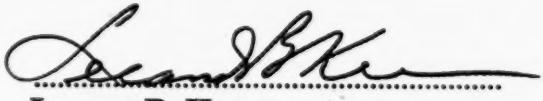
Respectfully submitted,

LELAND B. KEE

912 North Velasco Street
Angleton, Texas
Attorney for Respondents

CERTIFICATE OF SERVICE

A copy of Respondents' Brief in Opposition was served upon the following counsel of record on the 16th day of November, 1965: Wiley B. Thomas, Jr., 108 E. Magnolia Street, Angleton, Texas, John Ballard Bennett, Thomas & Bennett, 108 East Magnolia Street, Angleton, Texas, attorneys for Petitioner; Ernest A. Knipp, 701 Citizens State Bank Building, Houston, Texas, attorney for Ervin Stoebner; Derral K. Sperry, P. O. Box 6908, Houston 5, Texas, attorney for Commercial Body Corporation; and Sam Lee, P. O. Drawer R, Angleton, Texas, attorney for Ervin Stoebner, by depositing the same in the United States mail with first class postage thereon, properly addressed, in compliance with Rule 33 (1) of the Revised Rules of the Supreme Court of the United States.



LELAND B. KEE

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APPENDIX "A"

CARPENTER BODY WORKS, INC.,
Appellant,

v.

TOMMY D. McCULLEY, JR., ET AL.,
Appellees.

No. 14,603

COURT OF CIVIL APPEALS OF TEXAS
HOUSTON.
April 8, 1965.

Rehearing Denied April 29, 1965

BELL, Chief Justice.

This is an appeal from an order of the trial court overruling appellant's plea to the jurisdiction of the trial court, the plea being asserted in a special appearance made pursuant to the right conferred by Rule 120a, Texas Rules of Civil Procedure.

Tommy D. McCulley, Jr., individually and as next friend of Tommy D. McCulley, III, sued appellant and three other defendants, to recover damages for personal injuries suffered by Tommy, III, when a door on a school bus came open while Tommy III was a passenger, causing him to fall from the bus. Appellant was alleged to be the manufacturer of the bus. It was alleged that appellant was a foreign corporation doing business in Texas and that it had failed to appoint an agent for service. It was asked that service be made upon the Honorable Crawford D. Martin, Secretary of State, pursuant to the provisions of Article 2031b, Sec. 3 Vernon's Ann. Tex. Civ. St. Service was so made. Appellant filed its motion that the service be held invalid and that it be quashed.

Thereafter, two of the other defendants filed cross-actions against appellant. To each cross-action appellant also made a special appearance for the sole purpose of attacking the jurisdiction of the court on the ground that it was not amenable to service in an in personam action brought in Texas.

When the record was filed in this Court, we raised the question as to whether the Court had jurisdiction since the order overruling the plea to the jurisdiction was thought to be interlocutory and we knew of no statute or rule authorizing an appeal. We requested the filing of briefs by counsel directed solely to the question of our jurisdiction. Briefs have been filed by said counsel.

We are of the view that the order appealed from is purely interlocutory and there is no rule or statute authorizing an appeal from an order overruling a plea to the jurisdiction.

Rule 120a is silent as to appealability in such case but by strong implication it precludes an appeal. It provides in paragraph 3:

> "If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State."

This language to us shows an intention that the party whose plea to the jurisdiction is overruled shall thereafter proceed to trial on the merits and if he suffers adverse judgment on the merits, his complaints on appeal may encompass one complaining of the trial court's action in overruling his plea to the jurisdiction.

The only Texas case we have found discussing the appealability of an order overruling a plea to the jurisdiction is Fishbein v. Thornton, Tex. Civ. App., 247 S.W. 2d 404. In that case it was stated that an order overruling a plea to the jurisdiction was interlocutory and not appealable. We are in accord with that statement.

The rule in most states is that such an order is interlocutory and not appealable in the absence of statutory authority. 30 A.L.R. 2d 287, 291. Professor Wayne Thode of the University of Texas School of Law discusses Rule 120a in an article in 42 Texas Law Review 279. He there expresses the view that an order overruling a plea to the jurisdiction is interlocutory and not appealable.

Appeal dismissed.

APPENDIX "B"

ART. 2249. TO COURT OF CIVIL APPEALS

An appeal or Writ of Error may be taken to the Court of Civil Appeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases in which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds one hundred dollars exclusive of interest and costs.